

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH DWAYNE NICHOLS,

Defendant-Appellant.

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UNPUBLISHED

April 24, 2003

No. 231691

Jackson Circuit Court

LC No. 00-004110-FH

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of twenty-five to ninety-six months' imprisonment for the possession of heroin conviction and two to four years' imprisonment for the felonious assault conviction, to be served consecutive to the mandatory two-year prison term for the felony-firearm conviction. He was also sentenced to 34 to 480 months' imprisonment for the possession with intent to deliver cocaine conviction, to be served consecutive to the remaining sentences. He appeals as of right. We affirm.

On the morning of June 26, 2000, defendant arrived at the home of his former girlfriend, La'Neese Newcomb, and an argument took place. At trial, there was a dispute over whether defendant broke into the home or used his key to enter.<sup>1</sup> Sheree Faulkner, who was in one of the bedrooms at Newcomb's house, testified that she heard the front door being kicked. Thereafter, she heard screaming. Sheree was frightened and stayed in the bedroom until the house became quiet. When she exited the bedroom, neither defendant nor Newcomb were in the house. Sheree believed that Newcomb may be in trouble, and she took Newcomb's car to look for her. First, Sheree picked up her sister, Cherell Faulkner. They then drove to the home of Malinda Brown, defendant's girlfriend with whom defendant resided. Cherell exited the car and approached Brown's front door.<sup>2</sup> As she did, defendant opened the door and exited the residence. He was

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<sup>1</sup> Defendant was charged with an additional count of first-degree home invasion, MCL 750.110a(2). The trial court granted a directed verdict of acquittal on this charge.

<sup>2</sup> Cherell Faulkner's preliminary examination testimony was read into the record at trial.

holding a gun, which he pointed toward Cherell. He told her, in no uncertain terms, to leave the premises. She was scared and felt threatened. She asked defendant if Newcomb was with him. He continued to point the gun at her and tell her to get away from the house. She walked backwards to the car and reentered it. The Faulkner sisters then went to the Jackson police department to report the occurrences of the morning. In the meantime, a police officer arrived at Newcomb's residence. He found the front door open and two children inside. Newcomb later entered the premises. She testified that she exited the home during the argument in order to get away from defendant. She indicated that she was tired of listening to him.

After obtaining information from Newcomb and the Faulkner sisters, several officers went to Brown's home. Defendant failed to respond when officers knocked on the door. A search warrant for the premises was subsequently secured. Before it was executed, defendant left the house and was arrested. The police later searched Brown's premises pursuant to the warrant. In a closet, they found a locked safe, which Brown identified as belonging to defendant. The safe was later opened and contained a gun, substances that appeared to be illegal narcotics, an electronic measuring scale, a razor blade, baggies, a plate, and mannitol, a cutting agent used to cut pure cocaine and heroin. The recovered heroin weighed 2-1/2 grams. The cocaine weighed forty-nine grams.

## I

Defendant challenges the trial court's finding that the prosecutor used due diligence in attempting to produce both Malinda Brown and Cherell Faulkner as witnesses and the trial court's decision to allow the preliminary examination testimony of those witnesses to be read into the record. A finding of due diligence is a finding of fact that will not be set aside absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). The admission of the preliminary examination testimony is reviewed for an abuse of discretion. *Id.*

Former testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at that time. MRE 804(b)(1). The declarant is unavailable when he is absent from a hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5).

The party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable good faith effort to secure the declarant's presence at trial. The test does not require a determination that more stringent efforts would not have procured the testimony. [*Id.* (citations omitted).]

With respect to Brown, there was evidence that more than two weeks before trial, the police attempted to serve her with a subpoena at the address where she had resided with defendant. After determining that Brown no longer lived at that address, the police obtained a new address in Lansing through police department records. Jackson Police Officer Brett Stiles asked the Lansing police to secure service of the subpoena. On six occasions, the Lansing police attempted to serve Brown. Eventually, they made contact with Brown's mother, who resided at the known address. She indicated that Brown went to Ann Arbor to live or stay with a sister. Brown's mother provided no information with respect to the sister's name, address or telephone

number. The trial court accepted Stiles' testimony about the efforts made to serve Brown. It found that there was not much more the officers could do, given that they had no information about the sister with whom Brown was allegedly staying. It was satisfied that the due diligence requirement was met. This finding was not clearly erroneous. *Id.* The prosecution demonstrated that a reasonable, good faith effort was made to secure Brown's appearance. We further find that the trial court's admission of Brown's testimony was not an abuse of discretion under the circumstances. *Id.* A finding of due diligence was made. Moreover, Brown's testimony was relevant to the ownership of the safe that was found when the search warrant was executed and, at the preliminary examination, defendant cross-examined Brown about the presence of the safe in her home.

With respect to Cherell Faulkner, the issues of due diligence and the use of her preliminary examination testimony were waived by defense counsel. At trial, the prosecutor requested that she be allowed to read Cherell's preliminary examination testimony into the record after Cherell failed to appear pursuant to a subpoena. In response to the request, defense counsel indicated that he believed something more than service of process was necessary to establish due diligence. He questioned whether the service of process was accomplished by mail or personal service. Defense counsel also informed the trial court that Cherell's testimony was cumulative to that of her sister, Sheree. At the subsequent due diligence hearing, Stiles testified that he personally served Cherell at her place of work on the morning of November 16, 2000, four days before trial began. He further testified about the efforts made to serve Brown. After Stiles' testimony, defense counsel specifically objected to the use of Brown's preliminary examination testimony, arguing that due diligence was not shown. With respect to Cherell, however, defense counsel stated, "Your Honor, with regard to Ms. Faulkner, obviously, there's been service, according to the sworn testimony of Officer Stiles, and would certainly not voice any objection, if the Court should find that is as he says it is." Defense counsel not only failed to object and argue a lack of due diligence, but he affirmatively indicated that he would voice no objection. Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver extinguishes any error. *Id.* Thus, there is no error to review. *Id.* at 219. In addition, we note that defense counsel acknowledged that Cherell's testimony was cumulative. Thus, its admission was not prejudicial even if we agreed that it was erroneous. See *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996) (cumulative evidence is not prejudicial even if erroneously admitted). Moreover, defendant adequately cross-examined Cherell with respect to the issues in the case at the time of the preliminary examination. Cf. *People v Bean*, 457 Mich 677, 690; 580 NW2d 390 (1998) (error in admission of preliminary testimony was not harmless because the cross-examination at the preliminary examination was brief and did not explore the disputed issue).

## II

Defendant also argues that inadmissible drug profile evidence was used to secure his conviction for possession with intent to deliver cocaine, and thus, reversal of that conviction is required. The admission of evidence is generally reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). However, where, as here, there is no objection to the challenged testimony at trial, the issue is unpreserved. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Unpreserved issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “ ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocent.” [*Id.* (citations omitted).]

In this case, Officer Nathan Gross testified that he guarded Brown’s residence while another officer left the area to secure a search warrant. Gross spoke with defendant during this time and eventually took defendant into custody when he left the residence. Gross also testified that, in his tenure as a police officer, he had significant narcotics training and experience, which included making numerous undercover purchases of cocaine, heroin, speed, marijuana and methamphetamines. Gross briefly informed the jury about the manner in which cocaine and heroin are sold. He then testified about the evidence found in defendant’s safe. He indicated that the amount of recovered heroin constituted more than a normal single dose that would be purchased. In addition, the safe contained enough cocaine for 490 separate rocks, which could be individually sold. Gross additionally testified that, in his experience, drug users usually carry pocket scales, not electronic scales like the one found in defendant’s safe. Further, the mannitol and razor blades found in the safe could be used to cut down the purity of cocaine. Gross ultimately concluded that, based on his experience, the drugs found in the safe were for sale and not for personal use, especially given that no apparatus was found that would facilitate the use of the recovered drugs.

Drug profile evidence is essentially “a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale.” *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). It is a list of characteristics that law enforcement officers believe are typical of people engaged in illegal drug activity. *Id.*; *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). The use of drug profiles as substantive evidence is condemned in drug prosecutions. *Id.* at 239-240. However, a police officer’s testimony about the significance of the quantity of drugs found in a defendant’s possession, as related to the issue of intent to deliver, is admissible where based on the officer’s training and experience. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993). The fact that the expert testimony embraces the ultimate issue of intent to deliver does not render it inadmissible. *Id.* In *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991), this Court affirmed the use of a police officer’s testimony that the quantity and condition of the drugs in the defendant’s possession indicated an intent to deliver. The information was not within the knowledge of laymen and the officer’s testimony aided the jury in determining the defendant’s intent and guilt. *Id.*

In this case, the jury was not presented with a laundry list of broadly drawn characteristics about drug dealers for the purpose of establishing that defendant must be a drug dealer because he fit the profile. Rather, the purpose of Gross' testimony was to explain the significance of the items found in the safe in order to assist the jury in reaching a decision on the material issue of whether the drugs were for distribution. Gross focused on the characteristics of personal property found in the safe. He testified that the quantity of cocaine and heroin found, as well as the special scale, razors, cutting agent, and baggies, demonstrated an intent to deliver and did not demonstrate that the drugs were for personal use. This was proper expert testimony and not the type of profile evidence that has been condemned for use as substantive evidence. *Ray, supra; Hubbard, supra*. There was no plain error with respect to Gross' testimony. *Id.* at 238.

In reaching our conclusion, we note that the prosecutor never moved to qualify Gross as an expert witness at trial. Expert testimony to explain the significance of seized items is admissible if the expert is qualified. *Murray, supra*. Defendant did not object to this omission, however, and we find no plain error in the prosecutor's oversight. Given Gross' testimony with respect to his training and experience in the area of narcotics, he was unquestionably qualified to testify about the significance of the items found in defendant's safe. Thus, defendant cannot demonstrate any prejudice. *Carines, supra*.

In addition, defendant argues both that the prosecutor's admission and use of Gross' testimony constituted prosecutorial misconduct and that his counsel was ineffective for failing to object to the admission and use of the testimony. We disagree. As previously discussed, the admission of Gross' testimony was proper. Further, the prosecutor used the testimony in an appropriate fashion. She never argued that defendant must be guilty because he fit a specific profile. There was no prosecutorial misconduct. Moreover, where the admission and use of the evidence was proper, defense counsel was not ineffective for failing to object to the evidence. Counsel is not required to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

### III

Defendant next challenges the trial court's order that his sentence for possession with intent to deliver cocaine, MCL 333.7401(2)(a)(iv), is to be served consecutively to his sentences for felonious assault and possession of heroin. MCL 333.7401(3) provides, in relevant part, that a term of imprisonment imposed under § 7401(2)(a) "shall be imposed to run consecutively with any term of imprisonment for the commission of another felony." Defendant argues that, because the felony-firearm conviction was "another felony," his sentence for possession with intent to deliver cocaine should have been consecutive only to that felony sentence and should have been concurrent to his sentences for felonious assault and possession of heroin. Determining the scope of a criminal statute is a matter of statutory interpretation, which is subject to de novo review. *People v Small*, 467 Mich 259, 261; 650 NW2d 328 (2002).

In *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995), the Court addressed the language at issue. It determined that the Legislature did not intend to limit the scope of § 7401(3) and that a broad interpretation of the language "another felony" is required. *Id.* at 328-330. It held:

Where any of the felonies for which a defendant is being sentenced in the same proceeding are covered by the mandatory consecutive sentencing provision of § 7401(3), the sentence for that felony must be imposed to run consecutively to the term of imprisonment imposed *for other, nonenumerated felonies*. [*Id.* at 337.]

The holding is dispositive in this case. Defendant's sentence for his conviction under § 7401(2)(a)(iv) was required to run consecutively to his sentences for the other, nonenumerated felonies. Those felonies included felony-firearm, felonious assault and possession of heroin. Thus, the trial court properly ordered the sentence imposed under § 7401(2)(a) to be served consecutive to the felonious assault and possession of heroin sentences, which were also required to be served consecutive to the felony-firearm sentence. See MCL 750.227b(2).

#### IV

Defendant also challenges the trial court's refusal to instruct the jury on the lesser offense of unlawful use of heroin. Instructions on cognate lesser offenses are precluded. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); see also *People v Alter*, 255 Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 228005, issued 1/24/03), slip op at 3-4. Accordingly, the trial court did not err in declining the instruction.

#### V

In his supplemental brief, filed in propria persona, defendant raises three issues with respect to the effectiveness of his counsel. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, there was a reasonable probability that the result of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant first reiterates that counsel was ineffective for failing to object to Gross' testimony and to the manner in which the prosecutor utilized the testimony at trial. As previously discussed, Gross' testimony and the prosecutor's use of that testimony did not constitute error. Counsel was not ineffective for failing to object. *Torres, supra*.

Defendant next claims that counsel was ineffective for failing to call Malinda Brown as a witness. Defendant represents that Brown would have testified that the safe found in her home did not belong to defendant. It is undisputed that Brown was not located for trial and her preliminary examination testimony was read into the record. At the preliminary examination, defense counsel cross-examined Brown about the safe. She maintained that the safe belonged to defendant. Under the circumstances, defendant has not met his burden of demonstrating that if counsel had located and called Brown to testify, the outcome of his trial would have been different. *Stanaway, supra*. Thus, he has failed to support his claim of ineffective assistance of counsel.

Finally, defendant claims that trial counsel was ineffective for failing to introduce evidence of his drug habit. This issue is abandoned. An appellant may not announce his

position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give cursory treatment to an argument. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nevertheless, we note that the claim has no merit. Trial counsel asked Newcomb if defendant's drug habit was part of the reason that she ended her relationship with defendant. In closing argument, defense counsel argued that if the jury believed that the safe belonged to defendant, the contents proved nothing but that someone had a drug habit. Because counsel raised and argued the issue of defendant's drug habit, defendant cannot meet his burden of demonstrating that counsel's conduct fell below an accepted standard of reasonableness. *Stanaway, supra*. Moreover, defendant has not demonstrated that there is a reasonable probability that the outcome of his trial would have been different if his counsel had elicited more information about his alleged drug habit. *Id.*

Affirmed.

/s/ Michael J. Talbot  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell